(1879) 12 Ch. Div. 314; *Fletcher* v. *Powers* (1881) 131 Mass. 333; 6 Cyc., *supra.* The two doctrines are ultimately based upon diverse views of public policy. The usual argument for the New York doctrine that the arrangement induces a false credit, is equally applicable if the profits are to be applied to the mortgage debt, and loses force where recording gives notice. The objection that a mortgagor is authorized to sell out in defraud of creditors, exists only where there is no obligation to maintain the stock. Delay of general creditors follows any mortgage regardless of the power of sale. On the other side is the cogent argument that discontinuance of business, often the only alternative, is economically undesirable and harmful to creditors. *Etheridge* v. *Sperry* (1890) 139 U. S. 266, 277. If the mortgagor is bound to keep up stock, though authorized to enjoy the profits, there seems no reason for a conclusive presumption of fraud. *Briggs* v. *Parkman* (Mass. 1841) 2 Met. 258; contra, *Gallagher* v. *Rosenfield* (1891) 47 Minn. 507.

This view was rejected in the recent case of *Madson* v. *Rutten* (N. D. 1907) 113 N. W. 872, where, under a mortgage of this type, the mortgagee seized upon default after acquired property and sold on foreclosure to an innocent purchaser for value. The act of the mortgagee was sufficient in general to transfer title, *supra,* but, the mortgage being void for constructive fraud, no subsequent act done by the mortgagee under its authority could validate it against attaching creditors. *Mandeville* v. *Avery* (1891) 124 N. Y. 376; *Blakeslee* v. *Rossman* (1877) 43 Wis. 116; contra, *Read* v. *Wilson* (1859) 22 Ill. 376; *Barton* v. *Sitlington* (1895) 128 Mo. 164. A new transfer by the mortgagor in disregard of the prior mortgage would alone protect the mortgagee. *First Nat'l Bank etc.* v. *Enderson* (1878) 24 Minn. 435. The defendant, however, as a *bona fide* purchaser took good title on the well settled principle of fraudulent conveyances that a *bona fide* purchaser from the grantee is protected against creditors of the grantor. Bump, Fraud. Con. (4th Ed.) ch. 17.

SPECIFIC PERFORMANCE WITH COMPENSATION.—At law a vendor of land would be nonsuited were he to attempt to enforce a contract which he was unable to perform on his part. Where the failure of performance as to quality, *Drewe* v. *Corporation* (1804) 9 Ves. 368, or quantity, *Calcraft* v. *Roebeck* (1790) 1 Ves. Jr. 221; *Foley* v. *Crow* (1872) 37 Md. 51, is unsubstantial, equity will hear the vendor's suit since chancery, looking to the substance, Batten, Spec. Perf. 122; *Dyer* v. *Hargrave* (1805) 10 Ves. 505, and holding it unconscionable to take advantage of trivialities, *Stewart* v. *Alliston* (1815) 1 Mer. 25, will not permit the forms of law to be instruments of injustice. *Halsey* v. *Grant* (1806) 13 Ves. 73. Compensation is given as incidental, *Beyer* v. *Marks* (N. Y. 1870) 2 Sweeney 715, to complete the equitable relief and avoid circuity of action. *Erwin* v. *Meyer* (1863) 46 Pa. St. 96. This relief will be refused, however, unless two conditions are present: *Guynet* v. *Mantel* (N. Y. 1854) 4 Duer 86; *Beyer* v. *Marks, supra:* first, the defect must be immaterial; secondly, it must be measurable in money. The former is based on the consideration that equity will not enforce a contract never intended: were the defect material, the vendee probably would not have entered into the agreement. *Thomas*

v. *Deering* (1837) 1 Keen. 729; *Stewart* v. *Alliston, supra.* In the earlier cases the materiality of the deficiency was often ignored. *Drewe* v. *Hanson* (1802) 6 Ves. 675; see *King* v. *Wilson* (1843) 6 Beav. 124. But this looseness has been repudiated because of the dangers inherent in its enforcement. *Halsey* v. *Grant, supra,* see *King* v. *Barbeau* (1822) 6 Johns. Ch. 38. If the land is sold by metes and bounds, acreage may be treated as mere description, and no compensation will be given, *Moses* v. *Wallace* (1881) 7 Lea 413; *Meek* v. *Bearden* (1831) 5 Yerg. 467, provided the boundaries were as represented. *Voorhees* v. *DeMeyers* (1847) 2 Barb. 37.

When the vendee seeks compensation for a contract not performable *in specie,* the vendor's plea is that his purchaser rescind or pay in full. Such a plea relieving the vendor because he has charged himself with a liability greater than he can assume, is overruled. *Bogan* v. *Daughdrill* (1874) 51 Ala. 312; *Western* v. *Russell* (1814) 3 V. & B. 187. It would be unjust to allow him thus to shield himself behind his own default, *Waters* v. *Travis* (N. Y. 1812) 9 Johns. 450; *Erwin* v. *Meyers, supra,* and he must therefore convey with an abatement of the purchase price, irrespective of the materiality of the defect. *Graham* v. *Oliver* (1840) 3 Beav. 123; *Bennett* v. *Fowler* (1840) 2 Beav. 302, but see *Chicago Ry. Co.* v. *Durant* (1890) 44 Minn. 361; cf. *Wheatley* v. *Slade* (1830) 4 Sim. 126. The argument that because the vendor intended to sell all, he intended to sell any part of, his land, *Jones* v. *Evans* (1848) 17 L. J. Ch. 469; *Erwin* v. *Meyers, supra,* or, as often expressed, that "he cannot aver that he sold less than the whole," *Mortlock* v. *Buller* (1840) 10 Ves. 292, 315; *Marshall* v. *Cauldwell* (1871) 41 Cal. 611, is based upon a misstatement of fact. Its fallaciousness is shown in cases where the defect arises subsequent to the contract. The result reached, however, is proper, for the equity of the vendee should override the vendor's plea for either a *cy pres* execution or a suit at law.

This equity of the vendee, though not easily classifiable, appears to spring from the circumstances of the case. By construing a dictum of Lord Eldon in *Mortlock* v. *Buller, supra,* the foundation for this bar to the plea of the vendor has been sought in the doctrine of estoppel, *Rudd* v. *Lascelles* (1900) 1 Ch. 815; *Weatherford* v. *James* (1841) 2 Ala. 170. Lord Eldon's remarks, it is submitted, may more readily be explained as applying to a bar due to the equities of the situation rather than as furnishing a grounding for an estoppel *in pais.* On principle it does not appear that an estoppel is a satisfactory explanation since, even though the representation be true when made and the deficiency have resulted later, the plea of the defendant would still be barred. Cf. *Brown* v. *Ward* (1899) 110 Ia. 123; *Bass* v. *Gilliland* (1843) 5 Ala. 761. The vendee's notice of the falsity of the representation will bar an abatement, *Campbell* v. *Hay* (1828) 2 Moll. 102; *Knox* v. *Deans* (1887) 23 Fla. 64, since the offer of the vendee was probably the less because he knew the defect and to award him compensation would give a double allowance. *Peeler* v. *Levy* (1875) 26 N. J. Eq. 330; *Dyer* v. *Hargrave, supra.*

Thus if there is a material deficiency, the vendor cannot secure equitable relief, but the vendee may. This situation is regarded as an exception to the rule of mutuality; *Palmer* v. *Gould* (1895) 144 N. Y. 671; cf. *Lawrenson* v. *Buller* (1802) 1 Sch. & L. 13, but the situation would be reconcilable with a test of mutuality recently suggested. Prof. J. B. Ames, 3 COLUMBIA

LAW REVIEW 1; 1 Ill. Law Review 548. It has been stated that the rule of mutuality has no application here. *Sutherland* v. *Briggs* (1841) 1 Hare 26. It is admittedly difficult to distinguish the situation under discussion from a case of hardship where one party may enforce a contract and the other cannot. But were the mere presence of an equity in one party's favor, *ipso facto*, to take the case beyond the purview of the rule of mutuality, a doctrine would exist both difficult in its enforcement and dangerous to the continuance of the rule.

The remaining condition necessary to support this jurisdiction—that the defect must be measurable in money—is based on the conception that otherwise equity in its endeavor to do right might well work injustice. Where the difficulty arises as to defects of title, *Seaman* v. *Vaudrey* (1809) 16 Ves. 390, a reasonable estimate must suffice because an accurate estimate is impossible. (Compensation allowed) *Ramsden* v. *Hirst* (1858) 4 Jur. (N. S.) 200; (compensation refused) *Cato* v. *Thompson* (1882) 9 Q. B. D. 616. Because of the inherent difficulty of estimation, courts are divided as to awarding compensation for inchoate dower rights, see *Wilson* v. *Williams* (1857) 3 Jur. (N. S.) 810; contra, *Riesz's Appeal* (1873) 73 Pa. St. 485. If the vendee knew, however, of the vendor's marriage, compensation is always refused. *Lucas* v. *Scott* (1885) 41 Oh. St. 636; cf. *Emery* v. *Wase* (1803) 8 Ves. 505. As to defects in the quantity of land the measure of abatement generally followed, *Powell* v. *Elliott* (1866) L. R. 10 Ch. App. 424, is that adopted by a recent decision: *Baldwin* v. *Brown* (Wash. 1908) 93 Pac. 413: such proportion of the total purchase price will be deducted as the value of such proportion bore to the value of the entire tract at the time of purchase. The difficulties of estimation in cases of defect in quantity will rarely be as great as those recognized as not insuperable in cases of defect in quality, and hence in the former cases the vendee may nearly always obtain specific performance with compensation.

THE RIGHT OF A PERSONAL REPRESENTATIVE TO SUE FOR DEATH BY WRONGFUL ACT.—The common law rule, forbidding the maintenance of an action for injuries resulting from homicide, Burdick, Law of Torts 230, has been generally abrogated by statutes, see Tiffany, Death by Wrongful Act, which usually create a new cause of action, 5 COLUMBIA LAW REVIEW 545, to recover damages for the injuries sustained by certain beneficiaries. *Matter of Meekin* v. *Brooklyn etc. R. R. Co.* (1900) 164 N. Y. 145; *Holton* v. *Daley, Adm.* (1882) 106 Ill. 131. This right of action accrues whenever the wrongful act occurs within an actual, *Whitford* v. *Panama R. R. Co.* (1861) 23 N. Y. 465, or constructive jurisdiction, *McDonald* v. *Mallory* (1879) 77 N. Y. 546, subject to such a statute; and it is immaterial where the death took place, *Needham, Admx.* v. *Grand etc. Ry. Co.* (1865) 38 Vt. 294. The deceased, though instantly killed, cf. *Higgins* v. *Central etc. R. R. Co.* (1892) 155 Mass. 176, must have been entitled to maintain an action at the time of his death. *Hecht* v. *Ohio etc. Ry. Co.* (1892) 132 Ind. 507. Furthermore the right vests in the personal representative of the deceased who for purposes of suit is the owner of the claim. *Usher* v. *West Jersey R. R. Co.* (1889) 126 Pa. St. 206. Since the right is statutory these limiting conditions will be recognized by foreign tribunals as inseparable from it. 7 COLUMBIA LAW REVIEW 553. Consequently for jurisdictional purposes, though the beneficiaries may release their interests, *Pitts-*